United States Court of Appeals

for the Second Circuit

APPENDIX

74-2561

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2561

ELIAN BOLAÑOS

Plaintiff-Appellant

-v-

MAURICE F. KILEY, District Director,
Immigration and Naturalization Service,
New York District.

Defendant-Appellee

APPENDIX

BELOVIN & FLEISHMAN
Attorneys for Plaintiff-Appellant
Office & Post Office Address
97-18 Roosevelt Avenue
Corona, New York 11368

PETER HIRSCH, OF COUNSEL

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ELIAN BOLAÑOS

Plaintiff,

INDEX NO. 74C 1577

-against-

MAURICE F. KILEY

Defendant.

----------x

INDEX ON APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x.

ELIAN BOLAÑOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director,
Immigation and Naturalization Service,
New York District.

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VERIFIED COMPLAINT

The above-named Plaintiff, by his attorneys BELOVIN & FLEISHMAN, beings this action pursuant to Section 1983 of the Public Health and Welfare Law, 42 U.S.C. 1983, commonly known as the Civil Rights Law, and for his complaint alleges as follows:

1. Plaintiff is a native and citizen of Columbia. He entered the United States or or about July 22, 1973. He is married to a lawful permanent resident of the United States who is expecting a child fathered by plaintiff.

2. Plaintiff is a resident of this judicial district.

3. On or about March 12, 1974, Plaintiff was detained by agents of the Immigration and Naturalization Service and deportation proceedings were commenced against plaintiff by service upon him of a warrant of arrest, order to show cause and notice of hearing, and the posting of a $500.00 bond was required.

4. On April 18, 1974 a hearing was held before a special inquiry officer of the Immigration and naturalization Service and a decision was rendered ordering plaintiff's deportation under sections 241 (a) (2) and 241 (a) (9) of the Immigration and Nationality Act, of 1952, 8U.S.C. 1251 (a) (2) and 8 U.S.C. 1251 (a) (9) upon the grounds that he had remained in the United States beyond the period allowed under his visa. Plaintiff

was granted the privilege of voluntary departure to May 18, 1974.

5. Plaintiff did not depart on said date and on October 16, 1974 an application for Stay of Deportation and Restoration of Voluntary Departure was submitted to the Immigration and Naturalization Service on the grounds, among others, that Plaintiff had been unlawfully arrested prior to the voluntary departure date by the New York City Police on a serious criminal charge, which charges proved to be totally groundless, and were dismissed by the Grand Jury, Queens County under Indictment No. 654-74; that as a result of such arrest and incarceration from March 6, 1974 to April 16, 1974 [redacted], plaintiff's attorneys were preparing a suit against the City of New York's Police Department and the presence of the plaintiff in this country was and is absolutely necessary for the prosecution of such action, which has been commenced in the United States District Court for the [redacted] District of New York.

6. Said application was granted and voluntary departure restored nunc pro tunc provided proof be furnished of plaintiff's departure on or before November 7, 1974.

7. Request for further extension of voluntary departure has been denied and as no provisions are made for further appeal, 8CFR 243.4, all administrative remedies have been exhausted.

8. The suit brought against the New York City Police Department referred to in paragraph 5 herein is not frivolous and involves very serious matters not only to the plaintiff herein but to all aliens, particularly thos of Latin-American origin, whose civil rights are placed in jeopardy by similar unlawful arrests and detentions by the New York City Police.

9. By refusing to grant plaintiff time sufficient to prosecute his civil action noted above, defendant herein is denying

plaintiff the rights guaranteed by section 1981 of the Public Health and Welfare Law, 42 U.S.C. 1981".... to wit; to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...", said denial giving plaintiff cause to bring the action herein pursuant to 42 U.S.C. 1983.

10. If Plaintiff fails to depart this country or or before November 7, 1974, he will be subject to immediate arrest and deportation, will forfeit the $500 bond, and will encounter serious future difficulties in his application for permanent residency because of such deportation, in addition to the loss of his civil rights noted in paragraph 9 herein.

WHEREFORE, plaintiff prays:

a) For an order requiring the defendant to extend the Stay of Deportation and Voluntary Departure Status of plaintiff beyond November 7, 1974 to such time as is sufficient for plaintiff to prosecute his civil action against the New York City Police Department.

b) For an order restraining the defendant from enforcing the departure of the plaintiff from the United States and from forfeiting the bond posted in his behalf pending the final determination of this action.

c) For such other and further relief as may be appropriate.

Yours, etc.....

BELOVIN & FLEISHMAN, ESQS.
Attorneys for Plaintiff
Office & Post Office Address
97-18 Roosevelt Avenue
Corona, New York 11368

Dated: November 5, 1974
Queens, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ELIAN BOLAÑOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director
Immigration and Naturalization Service,
New York District.

Defendant.

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AMENDED VERIFIED COMPLAINT
Index No. 74C 1577

Plaintiff, ELIAN BOLAÑOS, by his attorneys BELOVIN & FLEISHMAN, seeks a review of a decision by defendant MAURICE F. KILEY by way of temporary restraining order, preliminary injunction, and injunction pursuant to the Administrative Procedure Act 5 U.S.C. 701-706, and as grounds alleges as follows:

1. Plaintiff is a native and citizen of Colombia. He entered the United States on or about July 22, 1973. He is married to a lawful permanent resident of the United States who is expecting a child fathered by plaintiff.

2. Plaintiff is a resident of this judicial district.

3. On or about March 12, 1974, Plaintiff was detained by agents of the Immigration and Naturalization Service and deportation proceedings were commenced against Plaintiff by service upon him of a warrant of arrest, order to show cause and notice of hearing, and the posting of a $500.00 bond was required.

4. On April 18, 1974 a hearing was held before a special inquiry officer of the Immigration and Naturalization Service and a decision was rendered ordering Plaintiff's deportation under Sections 241 (1)(2) and 241 (a)(9) of the Immigration and Nationality Act, of

1952, 8 U.S.C. 1251 (a)2) and 8 U.S.C. 1251 (a) (9) upon the grounds that he had remained in the United States beyond the period allowed under his visa. Plaintiff was granted the privilege of voluntary departure to May 18, 1974.

5. Plaintiff did not depart on said date and on October 16, 1974 an application for Stay of Deportation and Restoration of Voluntary Departure was submitted to the Immigration and Naturalization Service on the grounds, among others, that Plaintiff had been unlawfully arrested prior to the voluntary departure date by the New York City Police on a serious criminal charge, which charges proved to be totally groundless, and were dismissed by the Grand Jury, Queens County under Indictment No. 654-74; that as a result of such arrest and incarceration from March 6, 1974 to April 16, 1974 plaintiff's attorneys were preparing a suit against the City of New York's Police Department and the presence of the plaintiff in this country was and is absolutely necessary for the prosecution of such action, which has been commenced in the United States District Court for the District of New York.

6. Said application was granted and voluntary departure restored nunc pro tunc provided proof be furnished of plaintiff's departure on or before November 7, 1974.

7. Request for further extension of voluntary departure has been denied and as no provisions are made for further appeal, 8 CFR 243.4, all administrative remedies have been exhausted.

8. The suit brought against the New York City Police Department referred to in paragraph 5 herein is not frivolous and involves very serious matters not only to the plaintiff herein but to all aliens, particularly those of Latin-American origin, whose civil rights are placed in jeopardy by similar unlawful arrests and detentions by the New York City Police.

9. By refusing to grant plaintiff time sufficient to prosecute his civil action noted above, defendant herein is denying plaintiff the rights guaranteed by section 1981 of the Public Health and Welfare Law, 42 U.S.C. 1981, to wit; ".... to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...".

10. If Plaintiff fails to depart this country on or before November 7, 1974, he will be subject to immediate arrest and deportation, will forfeit the $500.00 bond, and will encounter serious future difficulties in his application for permanent residency because of such deportation. In addition to the loss of his civil rights noted in paragraph 9 herein.

WHEREFORE, Plaintiff prays:

a) For an order requiring the defendant to extend the Stay of Deportation and Voluntary Departure Status of Plaintiff beyond November 7, 1974 to such time as is sufficient for plaintiff to prosecute his civil action against the New York City Police Department.

b) For an order restraining the defendant from enforcing the departure of the plaintiff from the United States and from forfeiting the bond posted in his behalf pending the final determination of this action.

c) For such other and further relief as may be appropriate.

Yours, etc....

BELOVIN & FLEISHMAN, ESQS.
Attorneys for Plaintiff
Office & Post Office Address
97-18 Roosevelt Avenue
Corona, New York 11368

DATED: November 5, 1974
Queens, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIAN POLAROS

Plaintiff,

-against-

MAURICE F. KILEY, District Director,
Immigration and Naturalization Service,
New York District.

ORDER TO SHOW CAUSE

This cause coming on for hearing upon the application of plaintiff for an order to show cause and for a temporary restraining order and preliminary injunction as prayed for in the complaint on file herein, and it appearing from the allegations of the verified complaint, and from the affidavits of ELIAN POLAROS, and PETER HIRSCH, attached to and incorporated in said motion, that plaintiff is entitled to such relief unless good cause to the contrary be shown, it is hereby

ORDERED, that the defendant appear before the Honorable a Judge of this Court, in the United States Court House, in Foley Square on the day of November, 1974 at the hour of o'clock A.M. and then and there show cause, if any, there be, why this court should not issue a temprorary restraining order as prayed for in said complaint, And it is further

ORDERED, that copies of this order be served upon the defendant forthwith, together with copies of the summons and complaint, and it is further

ORDERED, that defendant refrain from deporting plaintiff, forfeiting the bond posted on his behalf or taking any other actions prejudicial to the plaintiff until this cause be heard.

Done at New York, New York, this day of November, 1974.

JUDGE

UNITED STATES DISTRICT COURT
[redacted] DISTRICT OF NEW YORK
EASTERN

----------x

ELIAN BOLAÑOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director
Immigration and Naturalization Service,
New York District.

AFFIDAVIT OF ATTORNEY IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER.

----------x

STATE OF NEW YORK)
) SS.:
COUNTY OF QUEENS)

PETER HIRSCH, being duly sworn, deposes and says:

That he is an associate in the firm of BELOVIN & FLEISHMAN, Attorneys for the Plaintiff in the above-entitled action.

This Affidavit is made in support of the application for an Order to Show Cause and Temporary Restraining Order and Preliminary Injunction.

That the action sought to be enjoined is the deportation of plaintiff on November 7, 1974 and the forfeiture of the bond posted on his behalf if he fails so to depart as more fully set forth in the verified attached complaint and affidavit of Plaintiff.

That the reason the Temporary Restraining Order and Preliminary Injunction should be granted is that the plaintiff has a meritorious action against the New York City Police Department as more fully set forth below and in the attached affidavit of Plaintiff, and if plaintiff is forced to leave the country by the Immigration and Naturalization Service he will not be able to pursue this action and his civil rights as guaranteed by 42 U.S.C. 1981.

Plaintiff in this action was arrested by the New York City

Police on or about March 1, 1974 and charged with Robbery in the First Degree (3 counts), Assault in the Second Degree and Possession of Weapons, etc. as a Felony.

Plaintiff was unable to post bail and was consequently held in the Queens House of Detention until April 16, 1974, when the Grand Jury dismissed all charges against plaintiff.

Said dismissal was based on the fact that it was shown that plaintiff was in fact at work at the time of the alleged accurence.

With minimal investigation on the part of the New York City Police Department, it could have been easily established that Plaintiff could not have committed the alleged crimes and the failure to make such investigation is a clear violation of plaintiff's civil rights as guaranteed by 42 U.S.C. 1981 and the United States Constitution, and BELOVIN & FLEISHMAN, as plaintiff's attorneys , intend to show that such failure to investigate was the result of plaintiff's status as a Spanish-speaking alien and discrimination by the New York City Police Department against such individual.

Section 1983 of the Civil Rights Act, 42 U.S.C. 1983, guarantees the rights of all persons within the jurisdiction of the United States to bring civil actions against any persons responsible for the deprivation of any rights, privileges or immunities secured by the Constitution and laws, which rights are further spelled out in 42 U.S.C. 1981.

The protection of such rights applies to aliens as well as citizens. Tapahashi v. Fish and Game Commission, 68 S. Ct. 1138, 334 U.S. 410; Yisk Wo v. Hopkins, 118 US 369, 6 S.Ct. 1064, U.S. v. Wong Kim Ork, 169 US 649, 696, 18 S.Ct. 456.

In summation, the temporary restraining order and preliminary injunction sought herein should be granted for the following reasons:

a) Plaintiff desires to remain in the United States only so long as is necessary to pursue the civil action against the New York City

Police Department as noted above.

b) Plaintiff does not contest his ultimate deportability.

c) No harm whatsoever will be done to defendant by permitting Plaintiff to remain in the country during the pendency of his civil action noted above.

WHEREFORE, your deponent respectfully prays that the within Order to Show Cause and Temporary Restraining Oroer be granted; and for such other and further relief as to this Court may seem just and proper.

This relief has not been asked for previously in this or any other court.

PETER HIRSCH

Sworn to before me this
5th day of November, 1974.

NOTARY PUBLIC

Notary Public, State of New York
Qualified in Kings County
Cert. Filed in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
[redacted] DISTRICT OF NEW YORK
EASTERN

ELIAN BOLAÑOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director,
Immigration and Naturalization Service,
New York District.

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATE OF NEW YORK)
COUNTY OF QUEENS) SS.:

ELIAN BOLAÑOS, being duly sworn, deposes and says:

1. He is the plaintiff in the above-entitled action.

2. This is an action for injunctive relief pursuant to 42 U.S.C. 1983.

3. Plaintiff was arrested on March 6, 1974 by the New York City Police Department and was held in lieu of $25,000.00 bail. The carges against plaintiff were three counts of Robbery in the First Degree; Assault in the Second Degree, and Possession of Weapons, etc.. as a Felony. On April 16, 1974 all charges were dismissed by the Grand Jury sitting in Queens County.

4. Plaintiff, has commenced an action in the United States District Court, Southern District of New York against the New York City Police Department for he believes said arrest was made in violation of his civil rights and was the result of prejudice and discrimination by the New York City Police Department against plaintiff because he is Spanish-speaking, of Latin origin and an alien.

5. That as a result of said arrest and detention plaintiff was deprived of income; was unlawfully made to endure the severe

privations and hardships attendant upon incarceration in the New York City Detention facility; suffered extreme shame and embarrassment in relation to his family, friends and employer; lost his employment; and was forced to spend large sums of money in attorneys fees.

6. As a further consequence of said arrest, plaintiff, a colombian citizen, was detained by the Immigration and Naturalization Service and proceedings were instituted against him as more fully set forth in the verified complaint herein.

7. The final result of said proceedings, after exhaustion of all administrative proceedings, is that if plaintiff does not leave the United States by November 7, 1974, he will be subject to immediate deportation, the $500.00 bond posted on his behalf will be forfeited, and his eventual re-admission to the United States will be greatly impeded by such deportation status in his record.

8. Unless defendant is enjoined and restrained during the pendency of this action from the commission of the acts threatened by him as above set forth, the plaintiff will suffer great and irreparable damage, in that if he leaves the United States by November 7, 1974 as directed by the Immigration and Naturalization Service he will loose his civil rights as guaranteed by the United States Constitution and 42 U.S.C. 1981 and 42 U.S.C. 1983 to pursue his civil action against the New York City Police Department, and if he fails to so depart, he will suffer the consequences noted in paragraph 7 of this affidavit.

/s/ Elian Bolaños

ELIAN BOLAÑOS

Sworn to before me this
5th day of November, 1974.

PETER HIESCH
Notary Public, State of New York
No. 31-4504
Qualified in New York County
Commission Expires March 30, 1976

NOTARY PUBLIC

CIS:PKP:mew
F.#742216

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

ELIAN BOLAÑOS,

Plaintiff,

-against-

AFFIDAVIT IN OPPOSITION

MAURICE F. KILEY, District Director Immigration and Naturalization Service, New York District,

Civil Action No. 74 C 1577

Defendant

- -X

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

PROSPER K. PARKERTON, being duly sworn, deposes and says:

1. That he is an Assitant United States Attorney, of counsel to DAVID G. TRAGER, United States Attorney for the Eastern District of New York, attorney for the defendant herein, and is in charge of this case on behalf of said defendant.

2. That he makes this affidavit in opposition to the application of the plaintiff for a temporary restraining order compelling the defendant to extend the stay of deportation and voluntary departure status of the plaintiff and precluding the defendant from enforcing the

departure of the plaintiff from the United States and from forfeiting the bond posted in plaintiff's behalf.

3. That he makes this affidavit upon information and behalf obtained by personnel of the Office of the District Director of the Immigration and Naturalization Service from the file of the plaintiff.

4. That the plaintiff, Elian Bolaños, entered the United States at Laredo, Texas on July 22, 1973, under a visa issued for a visitor for pleasure, which visa expired August 12, 1973.

5. That plaintiff ignored the expiration of his visa and an order to show cause why he should not be deported was served on the plaintiff on March 12, 1974.

6. That a hearing was held before a special inquiry officer on April 18, 1974.

7. That at the conclusion of the hearing the special inquiry officer issued an order to the effect that plaintiff was granted voluntary departure status, or if he failed to depart by May 18, 1974, he was to be deported to Columbia.

8. That plaintiff failed to appeal the order to the Board of Immigration Appeals and his time to do so has expired.

9. That plaintiff ignored the order and that on October 2, 1974, he was sent a letter directing him to report for deportation on October 17, 1974, at 9:00 a.m.

10. That on or about October 10, 1974, plaintiff advised the Immigration and Naturalization Service that he had married on July 26, 1974, that his wife was pregnant and that he was preparing a false arrest suit against the New York City Police Department.

11. That upon presentation of a ticket to Columbia on Avianca Airlines on November 7, 1974, his application for an indefinite stay of deportation was denied, but a stay of deportation was granted to and including November 7, 1974, and his voluntary departure status would be restored nunc pro tunc upon proof of his departure by said date.

12. That plaintiff or his attorneys were informed of said decision on October 22, 1974.

13. That no further application for a stay of deportation or voluntary departure status was made.

14. That on November 6, 1974, plaintiff commenced the present action and on the same date commenced the false arrest action against the Commissioner of the New York City Police Department.

15. That plaintiff failed to make a clear showing that he was entitled to the temporary restraining order sought herein, as is shown more fully by the memorandum of law served and filed herewith.

WHEREFORE, your deponent respectfully requests that the application for a temporary restraining order sought herein be denied in all respects, along with such other and further relief as the Court deems just and proper under the circumstances.

PROSPER K. PARKERTON
Assistant United States Attorney

Sworn to before me this
8th day of November, 1974

Stella B. Magier
Notary Public, State of New York
No. 24-4501884
Qualified in Kings County
Commission Expires March 30, 1975.-

CIS:PKP:ec
F. #742216

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

ELIAN BOLANOS,

Plaintiff,

- against -

Civil Action
No. 74 C 1577

MAURICE P. KILEY, District Director
Immigration and Naturalization
Service, New York District,

Defendant.

- X

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S APPLICATION FOR A
TEMPORARY RESTRAINING ORDER

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

THOMPSON K. PARKINSON
Assistant U. S. Attorney
(Of Counsel)

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER

STATEMENT OF FACTS

The facts are presented in the Affidavit served and filed herewith.

ISSUE

Whether the plaintiff has made the requisite clear showing of the elements necessary to warrant the issuance of a temporary restraining order.

ARGUMENT

The more clearly enunciated standard for the issuance of a preliminary injunction may be applied to the present application for a temporary restraining order. The well established standard for a preliminary injunction in the Second Circuit is whether there has been "a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Greshman v. Chambers, _____ F. 2d _____, No. 73-2733 No. 985 (2d Cir. August 13, 1974), Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973), Gulf & Western Indus., Inc. v. The Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692-693 (2d Cir. 1973).

The plaintiff's pleadings allege that the Court's jurisdiction depends upon 42 U.S.C. §1983 and that the acts complained of violate 42 U.S.C. §1981 giving rise to a claim under 42 U.S.C. §1983 for deprivation of civil rights under color of the law of any State or Territory. However, 42 U.S.C. §1983 is inapplicable to suits against the United States or its agents by its very terms and by judicial construction. District of Columbia v. Carter, 409 U.S. 418 (1973); Mouroc v. Pape, 365 U.S. 167 (1961). This failure to properly allege the grounds upon which the Court's jurisdiction depends or to state a claim upon which relief can be granted is, by itself, a failure to make the requisite "clear showing" of probable success on the merits or of sufficiently serious questions going to the merits to make them a fair ground for litigation.

Before considering whether the acts complained of might present such sufficiently serious questions going to the merits, it is necessary to consider the nature of the acts and their legal context. Accepting, for the purposes of this application, the allegation of the complaint, the act complained of was the denial of a stay of deportation and restoration of voluntary departure beyond November 7, 1974. It was not the issuance or terms of a final order of deportation pursuant to 8 U.S.C. §1252. Indeed, if it were the administrative remedy of an appeal to the Board of Immigration Appeals, as provided for in 8 C.F.R. §3.1-3.6 and §242.21, was not taken within the

prescribed time. Further, it appears the plaintiff does not contest the order of deportation or his ultimate deportability. Nor was the act complained of a denial of an application for suspension of deportation under 8 U.S.C. §1254 or §1255.

The only statutory provision arguably relevant to a stay of deportation is contained in 8 U.S.C. §1252(c), which states

> (c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. [Emphasis supplied]

The applicable regulation, 8 C.F.R. §243.4 states,

> . . . The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. . . . Denial of a stay is not appealable. . . .

Although judicial decisions often stress the plenary power of Congress to make rules for the admission of aliens, the Second Circuit has held that discretionary denials of stays of deportation are reviewable for abuse of that discretion Hang v. Immigration and Naturalization Service, 300 F.2d 715 (2d Cir. 1966). See United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489 (2d Cir. 1951). The established standard is whether the district director's decisions "were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissable basis such as an invidious discrimination against a particular race or group. Cheung v. Esperdy, 337 F.2d 819, at 820 (2d Cir. 1967); Hang v. Immigration and Naturalization Service, supra, at 719, United States ex rel. Kaloudis v. Shaughnessy, Supra at 491.

The available cases involving a denial of a stay of deportation in order to pursue pending civil litigation all appear to have been concerned with workmen's compensation claims of the alien. In each case the court found the denial of the stay did not constitute an abuse of discretion. Kladis v. Immigration and Naturalization Service 343 F.2d 513 (7th Cir. 1965); Adame v. Immigration and Naturalization Service 349 F. Supp. 313 (N.D. Ill. 1972); Parassinos v. District Director,

193 F. Supp. 416 (N.D. Ohio 1960). See Ferreira v. Shaughnessy, 241 F.2d 617 (2d Cir. 1957) [involving Suspension of Deportation

It should be noted that no proper allegation or "clear showing" of jurisdiction or abuse of discretion has been made. Even if they had been made, the circumstances of the denial of the stay of deportation, sought to pursue the false imprisonment claim, would not present a showing of probability of success on the merits or sufficiently serious questions going to the merits to warrant the issuance of a temporary restraining order.

Although no reported cases have been found where a denial of a stay of deportation has been contested on the grounds of the lawful residence in the United States of a spouse, where deportation has otherwise been opposed on such grounds, the courts have consistently upheld the actions of the Attorney General. See Silverman v. Rogers 437 F.2d 102 (1st Cir. 1970); Swartz v. Rogers, 254 F.2d 338 (D.D.C. 1958); Papageorgion v. Esperdy, 212 F. Supp. 874 (1963).

Since other possible bases for judicial review in this Court such as failure or refusal to exercise discretion or constitutional violations of substance, have not been advocated and do not bear a direct relationship to the present circumstances, they do not appear to merit discussion here.

CONCLUSION

For the foregoing reasons the application for a temporary restraining order compelling the defendant to extend the stay of deportation and voluntary departure status of the plaintiff and precluding the defendant from enforcing the departure of the plaintiff from the United States and from forfeiting the bond posted on behalf of the plaintiff should be denied.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Prosper K. Parkerton
Assistant U.S. Attorney
(Of Counsel)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ELIAN BOLANOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director
Immigration and Naturalization Service
New York District.

Defendant.

----------x

CIVIL ACTION NO. 74 C 1577

SUPPLEMENTAL AFFIDAVIT OF ATTORNEY IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAIN--ING ORDER.

STATE OF NEW YORK)
) SS.:
COUNTY OF QUEENS)

PETER HIRSCH, being duly sworn, deposes and says:

That he is an associate in the firm of BELOVIN & FLEISHMAN, attorneys for the Plaintiff in the above-entitled action.

This Affidavit is made in response to issues raised at oral argument before Hon. Chief Judge Mishler on November 7, 1974.

The Assistant United States Attorney arguing the Immigration and Naturalization Service's Case raised the jurisdictional issue of 42 U.S.C. 1983 applicability to a Federal government agency. In the short time available to research this matter, it appears the point might be well taken, and consequently an amended complaint is filed herewith, alleging jurisdiction under the Administrative Procedure Act 5 U.S.C. 701-706. In all other respects the amended complaint is substantially identical to the original.

Chief Judge Mishler raised the issue as to if the deportation were allowed to proceed, would not it be possible for plaintiff to return to the United States for the sole purpose of the trial, in particular if such visa were ordered by the District Court?

The answer, apart from the impracticality if not impossibility of such a procedure because of plaintiff's very limited economic means, is an emphatic no; the reason being that the sole control of visa issuance abroad is in the hands of the United States consulate which is under the jurisdiction of the State Department, and not the Immigration and Naturalization Service, and hence not a party to this action, nor can it be made a party. Further, the issuance of a visa by an American consulate abroad is within the sole discretion of such consulate and not reviewable in the courts, Act of 1952, § 104 (a), 221, 8 U.S.C.A. § 1104 a. 1201; United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928); See Brownell v. Tom We Shung 352 U.S. 180, 184 n.3 (1956); United States ex rel. Ulrich v. Kellogg, 1929, 58 App. D.C. 360, 30 F2d 984, certiorari denied United States ex rel. Ulrich v. Stimson, 279 U.S. 868, 49 S. Ct. 482; Licea-Gomez v. Pilliod 193 F. Supp. 577.

Even if the court should so direct that a visa should be issued to plaintiff said order is not binding upon the consulate and the consulate can refuse to honor the said order and not be subject to judicial review or contempt proceedings. If Plaintiff was outside the Courts it would be impossible to proceed with the Pre-Trial procedures in the Civil Court.

Although 42 U.S.C. 1983 does not confer jurisdiction, the rights guaranteed by 42 U.S.C. 1981 still are due plaintiff, to wit: "... to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...." (emphasis added).

Turning to the substance of the action against the New York City Police Department, it should be pointed out that all charges against defendant were dismissed by the Grand Jury sitting in Queens County and it is being alleged in the verified complaint in that action that had there been an adequate investigation, the case would never ever have reached that state.

Plaintiff would not have been incarcerated for so prolonged a period of time which was unconscienable. Plaintiff was never tried on the merits due to the dismissal of the charge by the Grand Jury (See Exhibit "A") is an indication that Plaintiff has a good meritorious action as specified in the Verified Complaint against the Police Commissioner of the City of New York. To deny Plaintiff recourse would substantially his property right as guaranteed by the Constitution.

If said deportation is permitted then the Court is allowing the Immigration and Naturalization Service, under the guise of its discretionary powers, to abbrogate a right guaranteed to plaintiff by the Constitution. Congress in its wisdom never meant to grant to the Immigration and Naturalization Service the right to deny plaintiff his guaranteed Constitutional rights by subjecting plaintiff to deportation. Neither can Congress grant the Immigration and Naturalization Service the right to deny plaintiff of his constitutional rights by merely deporting him.

WHEREFORE, Affiant respectfully requests that the Court grant the relief asked for in the Order to Show Cause and any and other remedy which may seem just and proper.

PETER HIRSCH

Sworn to before me this
7th day of November, 1974.

NOTARY PUBLIC

CARMEN I. SOSA
Notary Public
Qualified in
Commission Expires

(EXTRACT FROM THE MINUTES)
(General Form)

At a Criminal Term of the Supreme Court, *held in and for Queens County at the Court House on the* 16 *day of* April *19*74

PRESENT:

Honorable ----------

Justice of the Supreme Court.

Indictment No. 654-74 (Q405071)

THE PEOPLE OF THE STATE OF NEW YORK

vs.

Roberto Bolanois

On April 16,1974 the April 74 Grand Jury handed up a finding in which no indictment was found & charges were dismissed.

654-74 Robbery 1st (3cts)
Assault 2nd
Poss. of Weapons etc. as Felony

A TRUE EXTRACT FROM THE MINUTES. 9/25/74

J. J. Guinan
Clerk.

Exhibit "A" -28a-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -

74 C 1577

ELIAN BALANOS,

Plaintiff,

-against-

Memorandum of Decision and Order

MAURICE F. KILEY, District Director Immigration and Naturalization Service, New York District,

Defendant.

November 15, 1974

- - - - - - - - - - - - - - - - - -

Plaintiff moves to enjoin the defendant from deporting the plaintiff and forfeiting a bond in the amount of $500, which plaintiff posted upon condition that he leave the United States by November 7, 1974.[1]

This is an action brought pursuant to the Administrative Procedure Act, 5 U.S.C. §701 et seq. The amended verified complaint[2] and the material facts are not

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[1] The court directed that no forfeiture of the bond be declared until after a determination of the instant motion.

[2] Plaintiff originally brought the action as a civil rights action pursuant to 42 U.S.C. §1983. On the return date of the motion, counsel for the plaintiff agreed that the action was misconceived and reframed it under the Administrative Procedure Act.

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in dispute. Plaintiff entered the United States at Lorado, Texas, under a visitor's visa on July 22, 1973. His visa expired on August 12, 1973. The visa was not extended and plaintiff remained in the country illegally. On March 6, 1974, plaintiff was arrested by members of the New York City Police Department and charged with robbery in the first degree, assault in the second degree and possession of weapons. A Queens County grand jury failed to indict the plaintiff and the charges were dismissed on April 16, 1974.

As a result of his arrest, plaintiff's whereabouts became known to the Immigration and Naturalization Service, which thereupon issued a detainer warrant for plaintiff. Pursuant to this warrant, plaintiff was turned over to the Immigration and Naturalization Service upon his release from custody of the New York City Police. On April 18, 1974, a hearing was held before a special inquiry officer of the Immigration and Naturalization Service pursuant to sections 241(a)(2) and 241(a)(9) of the Immigration and Nationality Act, of 1952, 8 U.S.C. §§1251(a)(2) and (a)(9) on the grounds that plaintiff had remained in the United States beyond the period allowed under his visa. The order granted plaintiff voluntary departure status through May

18, 1974.

On October 16, 1974, nearly five months after his voluntary departure status had expired, plaintiff applied for a stay of deportation on the ground that his attorneys were preparing a civil rights action against the members of the New York City Police Department, stemming from his arrest and incarceration from March 6, 1974 to April 16, 1974. Plaintiff requested a stay of indefinite duration until the law suit was resolved. The application was granted to the extent of extending the privilege of voluntary departure to November 7, 1974, upon condition that plaintiff present proof that he had made arrangements to depart from the country. Plaintiff filed the complaint in this action on November 6, 1974, and simultaneously brought a civil rights action against the members of the New York City Police Department in this court. In the meantime, on July 26, 1974, plaintiff married an American citizen. The court is advised that plaintiff's wife is now pregnant.

JURISDICTION

Defendant asserts that this court does not have subject matter jurisdiction over this action. Defendant bases its claim on section 106(a) of the Immigration and

Naturalization Act (8 U.S.C. §1105(a)) which vests exclusive jurisdiction for ". . . the judicial review of all final orders of deportation" in the Circuit Court of Appeals.

It is evident, however, that the jurisdictional limitation imposed by this section does not apply to the present case.

In Foti v. Immigration and Naturalization Service, 375 U.S. 217, 224, 84 S.Ct. 306, 311 (1963), the Court stated that "[t]he fundamental purpose behind §106(a) was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." However, the Court further held that §106(a) did not extend to a request for ancillary relief which did not attack the deportation order itself.

In Foti, the plaintiff conceded his deportability during a hearing conducted before a special inquiry officer, under section 242(b) of the Act (8 U.S.C. §1252). He then sought suspension of deportation on the ground that it would be difficult for him to earn a living in Italy and deportation would require liquidation of a bakery business

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he owned in Brooklyn. The stay was denied. Plaintiff filed a petition in the district court for declaratory judgment and injunctive relief. The Court held that the Attorney General's refusal to grant a suspension of deportation was not a final order of deportation. Consequently, section 106 (a) did not apply and jurisdiction was properly in the district court.

More recently, in Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 88 S.Ct. 1970 (1968), the Court sustained a decision in which the Court of Appeals for the Third Circuit dismissed an alien seaman's petition for adjusted status under 8 U.S.C. §1153(a).[3] The Court found that review of an order denying relief of this nature did not fall within the ambit of §106(a)'s authority. Id. "We believe . . . that Congress quite deliberately restricted the application of §106(a) to orders entered during proceedings conducted under §242(b) or directly challenging deportation orders themselves." 392 U.S. at 215, 88 S.Ct. at 1975.

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[3] 8 U.S.C. §1153(a) provides for "temporary harboring in this country . . ." where an alien demonstrates fear of persecution by Communist dominated countries.

FPI—SS—3-17-72—30M—9153

Moreover, the Court of Appeals for the Ninth Circuit has interpreted Kwok and Foti as holding that an application for a stay of deportation was a proceeding separate and distinct from the section 242 hearing and not within the jurisdictional grant of section 106(a). Hong v. Agency for International Development, 470 F.2d 507 (9th Cir. 1972.[/4]

These cases make it quite clear that in a case such as the present one, where plaintiff does not challenge the deportation order, but merely requests a stay, the district courts have jurisdiction.

SCOPE OF REVIEW

Having found jurisdiction, it is necessary to consider whether the Service's refusal to grant plaintiff a stay of deportation constitutes an abuse of discretion. Initially it is important to note that a stay of deportation

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[/4] In Hong, the plaintiff sued in the district court for breach of contract claiming that A.I.D. agreed to sponsor him until he earned his Ph.D. A.I.D. withdrew its sponsorship making Hong deportable. The court held that the district court erred in dissolving a temporary restraining order since ". . . the validity of the deportation order was not in issue in the district court . . ." 470 F.2d at 508. See Li Cheung v. Esperdy, 377 F.2d 819, 820 (2d Cir. 1967), Tai Mui v. Esperdy, 371 F.2d 772, 775-777 (2d Cir. 1966).

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is an action committed to administrative discretion, and the refusal to grant a stay will not be set aside unless there is a clear showing of abuse of discretion. E.g., Kladis v. Immigration and Naturalization Service, 343 F.2d 513, 515 (7th Cir. 1965). No such showing has been made in this case.

First, the Service had ample reason for refusing to grant plaintiff a stay of deportation. Plaintiff consistently failed to depart voluntarily. Furthermore, when he did not depart on March 12, 1974 or on May 18, 1974, plaintiff violated mandatory orders of the Service. Under these circumstances, the Service's refusal to grant plaintiff a further stay was an appropriate response.

Nor does the fact that plaintiff has initiated a civil rights action render the Service's decision abusive or irrational. Although there may be a customary practice of allowing aliens to remain in this country until the completion of pending litigation, the Service is by no means bound to such a practice. Several courts have held that this policy can be changed or discretionarily applied to avoid dilatory tactics and delays in contravention of the general policies of the immigration laws. Fan Wan Keung et al. v. Immigration and Naturalization Service, 434 F.2d 301, 306 (2d Cir. 1970), Adame v. Immigration and

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Naturalization Service, 349 F. Supp. 313, 315 (N.D. Ill. (1972). The court in Keung cited with approval the opinion of the Immigration and Naturalization Service in In Matter of M, 4 I & N Dec. 626, 628 (1952):

> An alien who once was granted voluntary departure and who is found here illegally, does not merit a second chance for such departure in the absence of very strong extenuating circumstances.

The court finds therefore that there was no abuse of discretion in the Service's refusal to grant plaintiff a stay of deportation. Consequently, the motion to enjoin defendant from deporting plaintiff is denied and it is

SO ORDERED.

U. S. D. J.

FPI—SS—3-17-72—30M—9153

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ELIAN BOLAÑOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director,
Immigration and Naturalization Service,
New York District.

Defendant.

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NOTICE OF APPEAL

Index No. 74C1577

Notice is hereby given that Elian Bolaños, plaintiff above named hereby appeals to the United States Court of Appeal for the Second Circuit from the order denying plaintiff motion to enjoin defendant from deporting plaintiff entered in this action on the 19th day of November, 1974.

DATED: November 25, 1974

BARTON FLEISHMAN

DELOVIN & FLEISHMAN, ESQS.
Attorneys for Plaintiff
Office and Post Office Address
97-18 Roosevelt Avenue
Corona, New York 11368

TO: DAVID TRAGER
U.S. Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201
by Prosper K. Parkerton, of Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ELIAN BOLAÑOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director,
Immigration and Naturalization Service,
New York District.

Defendant.

----------x

ORDER TO SHOW CAUSE

Civil Action No. 74C1577

Upon the annexed motion and Affidavit of Barton Fleishman, it is

ORDERED that the defendant Show Cause at a motion term of this Court to be held in Rm. United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York on the day of December, 1974 at o'clock or as soon thereafter as Counsel can be heard why an order should not be made herein enjoining the deportation of plaintiff and enjoining the forfeiture of the bond posted in plaintiff's behalf pending the hearing and determining of plaintiff's appeal for the Second Circuit.

IT IS FURTHER ORDERED that service of a copy of this order and of the papers upon which the same is granted on the said defendant, on or before November 29, 1974 shall be sufficient service of this order and in the meantime and until the hearing and determination of this motion and an entry of an order thereon, let all proceeding be stayed for the deportation of plaintiff and forfeiture of the bond posted in his behalf.

DATED: November , 1974
Brooklyn, New York

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ELIAN BOLANOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director,
Immigration and Naturalization Service,
New York District.

Defendant.

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MOTION FOR INJUNCTION PENDING APPEAL.

CIVIL ACTION NO. 74C1677

Upon the amended complaint and all the affidavits and other papers filed, and all the proceedings heretofore had herein, the plaintiff moves this Court pursuant to Rule 62 (c) of the Federal Rules of Civil Procedure, for an order restraining defendant pending the hearing and determining of plaintiff's appeal to the United States Court of Appeals for the Second Circuit from the judgment of this Court entered November 19, 1974 denying plaintiff's motion to enjoin the defendant from deporting plaintiff or forfeiting the bond posted in plaintiff's behalf, and for such other and further relief as to the Court may seem just.

BARTON FLEISHMAN

BELOVIN & FLEISHMAN, ESQS.

Attorneys for Plaintiff
Office & Post Office Address
37-18 Roosevelt Avenue
Corona, New York 11368

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ELIAN BOLAÑOS

Plaintiff,

-against-

MAURICE F. KILEY, District Director, Immigration and Naturalization Service, New York District.

Defendant.

AFFIDAVIT OF ATTORNEY

Civil Action No. 74C1577

STATE OF NEW YORK)
) ss.
COUNTY OF QUEENS)

CARLOS FLEISHMAN, being duly sworn deposes and says:

That he is a partner in the firm of BELOVIN & FLEISHMAN, attorneys for the plaintiff in the above entitled action.

This Affidavit is made in support of the annexed Motion for Injunction Pending Appeal and Order to Show Cause.

That the action sought enjoined is the departure of plaintiff on December 2, 1974 and forfeiture of the bond posted on his behalf if he fails so to depart.

That on November 13, 1974 an Order was entered by this Court denying plaintiff motion for an injunction restraining defendant from deporting plaintiff or forfeiting the bond posted on his behalf pending the trial and determination of plaintiff's action entitled Elian Bolaños v. Michael J. Codd in the United States District Court, Eastern District of New York, Civil Action No. 74C1578.

That following said order Immigration and Naturalization Service granted plaintiff until December 2, 1974 to depart from the

without being deported or forfeiting bond posted on his behalf.

That on November 26, 1974, Mr. George Basel, the duly delegated officer of the Immigration and Naturalization Service, New York District, denied plaintiff's request for a further extension in order to give plaintiff and his attorneys time to perfect his appeal to the Court of Appeals in the instant case.

That if the Court does not grant the requested injunction plaintiff will be irreparably harmed, for if he departs the country on or before December 2, 1974, this appeal will be mooted, as, even if successful, plaintiff will not be able to return to this country once deported. If he does not depart on or before December 2, 1974 he will forfeit the $500.00 bond posted on his behalf and will have the status of "Deported" entered in his Immigration Record which will cause him grevious harm in his pending application for lawful permanent residency.

That plaintiff desires neither to lose his constitutional rights of due process to appeal the adverse decision rendered in this matter, or to defy an order of the Immigration and Naturalization Service.

That deponent verily believes that this is a meritorious appeal with a probable chance of success which presents important constitutional issues which preliminary research indicates are of First Instance.

That said research cited against plaintiff's position by both the court and the defendant are clearly distinguishable in that in none is alien left without a remedy, even if deported, (as in the Workmen's Compensation Cases cited on pages 4 and 5 of the defendants memorandum in opposition) and that no case cited deals squarely with the constitutional issue of an aliens right to sue on a meritorious cause of action and to what extent, if any, can that right be infringed upon by the Immigration and Naturalization Service or any other party including

this Court.

Deponent believes that this issue is of great importance not only to plaintiff but to all aliens so similarily situated, and indeed ôût consttitutional form of government and the rights guaranteed therein to all personalwithin the jurisdiction of the United States.

That this relief has not been previously applied for in this or any other court.

That on November 27, 1974 at approximately 11:00 A.M., Prosper K. Parkerton, Assistant U.S. Attorney for the Eastern District of New York was informed by telephone that the annexed Motion add Order To Show Cause were beinq brought and that a hearing on JDecember 2, 1974 would be sought.

WHEREFORE, your deponent respectfully prays that the within motion for an injunction pending an appeal and Order to Show Cause be granted and for any and other further relief that this Court may deem just and p proper.

BARTON FLEISHMAN

Sworn to before me on
this 27th day of November, 1974.

BARUCH I. SOSA
Notary Public, State of New York
No. 41-[illegible]
Qualified in Queens County
Commission Expires March 30, 19 75

CIS: PKP:ec
F. #742216

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

ELIAN BOLAÑOS,

Plaintiff,

- against -

MAURICE F. KILEY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT,

Defendant.

- -X

Index No.
74-2561

(E.D.N.Y. Civil Action No.
74 C 1577)

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
)ss.:
COUNTY OF KINGS)

PROSPER K. PARKERTON, being duly sworn, deposes and says:

1. He is an Assistant United States Attorney, of counsel to DAVID G. TRAGER, United States Attorney for the Eastern District of New York, attorney for the defendant herein, and is in charge of the matter on behalf of said defendant.

2. He makes this affidavit in opposition to the plaintiff's application for an order enjoining the deportation of the plaintiff and the forfeiture of the bond posted in plaintiff's behalf pending the hearing and determination

of an appeal from an order of the District Court denying the plaintiff similar injunctive relief pending the hearing and determination of his action challenging the denial by the Immigration and Naturalization Service of a request for a further stay of an order of deportation and voluntary departure.

3. The facts are not in dispute and are clearly set forth in Chief Judge Mishler's memorandum of decision denying the plaintiff's request for a temporary restraining order and preliminary injunction in the District Court:

> Plaintiff entered the United States at Larado, Texas, under a visitor's visa on July 22, 1973. His visa expired on August 12, 1973. The visa was not extended and plaintiff remained in the country illegally. On March 6, 1974, plaintiff was arrested by members of the New York City Police Department and charged with robbery in the first degree, assault in the second degree and possession of weapons. A Queens County grand jury failed to indict the plaintiff and the charges were dismissed on April 16, 1974.
>
> As a result of his arrest, plaintiff's whereabouts became known to the Immigration and Naturalization Service, which thereupon issued a detainer warrant for plaintiff. Pursuant to this warrant, plaintiff was turned over to the Immigration and Naturalization Service upon his release from custody of the New York City Police. On April 18, 1974, a hearing was held before a special inquiry officer of the Immigration and Naturalization Service pursuant

to sections 241(a) (2) and 241(a) (9) of the Immigration and Naturalization Act, of 1952, 8 U.S.C. §§1251(a) (2) and (a) (9) on the grounds that plaintiff had remained in the United States beyond the period allowed under his visa. The order granted plaintiff voluntary departure status through May 18, 1974.

On October 16, 1974, nearly five months after his voluntary departure status had expired, plaintiff applied for a stay of deportation on the ground that his attorneys were preparing a civil rights action against the members of the New York City Police Department, stemming from his arrest and incarceration from March 6, 1974 to April 16, 1974. Plaintiff requested a stay of indefinite duration until the law suit was resolved. The application was granted to the extent of extending the privilege of voluntary departure to November 7, 1974, upon condition that plaintiff present proof that he had made arrangements to depart from the country. Plaintiff filed the complaint in this action on November 6, 1974, and simultaneously brought a civil rights action against the members of the New York City Police Department in this court. In the meantime, on July 26, 1974, plaintiff married an American citizen. (Paragraph "1" of plaintiff's amended verified complaint alleges that his wife is a lawful permanent resident of the United States). The court is advised that plaintiff's wife is now pregnant.

4. The plaintiff commenced this action under the Administrative Procedure Act, 5 U.S.C. §701 et seq. seeking to enjoin the defendant from deporting the plaintiff and forfeiting a bond in the sum of $500.00 and requiring the

defendant to extend the stay of deportation and voluntary departure status of the plaintiff for indefinite period so that he might remain in the United States during the prosecution of his civil rights action against members of the New York City Police Department.

5. The plaintiff sought similar injunctive relief pending the determination of this action by an application for a temporary restraining order and preliminary injunction, which application was denied by Chief Judge Mishler's memorandum of decision and order dated November 15, 1974.

6. The plaintiff then filed a notice of appeal of the denial of the temporary restraining order and preliminary injunction and sought the same injunctive relief pending hearing and determination of the appeal, which relief was denied in the first instance by Chief Judge Mishler's memorandum of decision dated November 29, 1974, and is now before this Court.

7. During the pendency of these proceedings the Immigration and Naturalization Service has voluntarily extended the plaintiff's stay of deportation and voluntary departure and they are presently extended to December 11, 1974.

8. This action does not contest the plaintiff's

ultimate deportability or the order of deportation but only challenges the discretionary denial by the Immigration and Naturalization of an application for a stay of deportation and voluntary deportation beyond November 7, 1974, and for an indefinite period in order for the plaintiff to pursue civil litigation.

9. The determination of an application for a stay of deportation and voluntary departure is committed to agency descretion and will not be set aside unless there is a clear showing of abuse of discretion. Kladis v. Immigration and Naturalization Service, 343 F.2d 513 (7th Cir. 1965).

10. There are ample grounds to support the agency's exercise of discretion. First, the plaintiff has consistently failed to depart voluntarily. He did not depart on or before August 12, 1973, when his visitor's visa expired. Nor did he depart on or before May 18, 1974, when his voluntary departure status expired. His voluntary departure status was reinstated and extended to November 7, 1974, only after he had been ordered to report for deportation on October 17, 1974, and had presented an airline ticket to Colombia for November 7, 1974. Secondly, in order to avoid dilatory tactics and delays in contravention of the general policy of the immigration law, the Immigration and Natural-

ization Service may rationally deny stays of deportation for the alien to pursue pending civil litigation. Fan Wan Keung et al. v. Immigration and Naturalization Service, 434 F.2d 301 (2d Cir. 1970). Adame v. Immigration and Naturalization Service, 349 F.Supp. 313 (N.D.Ill. 1972).

11. Accordingly, there was no abuse of discretion by the Service and there can be no showing by the plaintiff of a probability of success on the merits in the present application.

12. There is no showing of irreparable injury in a possible forfeiture of his $500.00 bond since the plaintiff's voluntary departure status has been extended to December 11, 1974, and whether he voluntarily leaves by that date is within his discretion.

13. The only privilege the plaintiff will lose with regard to his civil rights action by leaving the United States on or before December 11, 1974, is the privilege of being physically present in the United States during the pendency of the action. If he applies for lawful entry into the United States and lawful permanent residence, it is possible that he might be physically present in this country before termination of his civil rights action. Althourgh the plaintiff seeks to elevate this privilege to

the status of a constitutional right, it is not such a right. Even if it were, it might be limited in conformity with due process under circumstances such as those in the present instance.

WHEREFORE, your deponent respectfully demands that the plaintiff's application for an injunction pending appeal be denied in all respects, along with such other and further relief as the Court deems just and proper under the circumstances.

PROSPER K. PARKERTON
Assistant U. S. Attorney

Sworn to before me this
5th day of December, 1974.

Evelyn Sommer
Notary Public, State of New York
No.24-4502158
Qualified in Kings County
Commission Expires March 30, 19__

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -x

ELIAN BOLANOS,

Plaintiff,

- against -

MAURICE F. KILEY, District Director, Immigration and Naturalization Service, New York District,

Defendant.

- -x

No. 74-C-1577

Memorandum of Decision

November 29, 1974

Motion for a stay of the deportation order is in all respects denied. The court advised plaintiff's counsel of the memorandum of decision of this court dismissing the complaint herein on November 19, 1974. Immigration and Naturalization Service extended voluntary departure until December 2, 1974. Any further judicial relief must be sought in the Second Circuit Court of Appeals.

U. S. D. J.

Plaintiff's attorney advised.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ELIAN BOLAÑOS

Plaintiff,

-against-

MICHAEL J. CODD, Police Commissioner,
New York City Police Department.

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VERIFIED COMPLAINT

The above-named plaintiff, by his attorneys BELOVIN & FLEISHMAN, ESQS. brings this action pursuant to section 1983 of the Public Health and Welfare Law, 42 U.S.C. 1983, commonly known as the Civil Rights Law, and for his complaint alleges as follows:

1. Plaintiff is a Spanish-speaking alien, native and citizen of Colombia who resides in Queens County, City of New York.

2. Defendant is the duly appointed Police Commissioner of the Police Department of the City of New York.

3. On March 6, 1974, Plaintiff was arrested by one "John Doe" police officer of the New York City Police Department acting in consert with several other police officers of the New York City Police Department also unknown, all under the command of defendant herein, and charged with the crimes of Robbery in the First Degree (3 Counts), Assault in the Second Degree and Possession of Weapons, etc. as a Felony.

4. Plaintiff, understanding and speaking very little English, was unable to understand what he was being charged with and to provide the information at the time of arrest, which had he not been under such disability, or had the Police Department not acted in a discriminatory manner by not providing an adequate interpreter, would have lead to his immediate release.

5. Because of said, unlawful arrest plaintiff was held from March 6, 1974 until April 16, 1974 in lieu of $25,000.00 bail.

6. On April 16, 1974, plaintiff appeared before the Grand Jury, Queens County, Indictment No. 654-74.

7. Based on the testimony given by the Plaintiff and others before said Grand Jury, all charges against the Plaintiff were dismissed.

8. Had the New York City Police Department adequately investigated the case as they are legally bound to do, plaintiff herein would never have been arrested, but because of a pattern of discrimination within the Department aganst Spanish-speaking Latins and, in particular, aliens, the investigation was not, in fact, adequate, resulting in the unnecessary and unlawful arrest and detention herein described.

9. That as a result of said unlawful arrest and imprisonment, Plaintiff was deprived of income,was made to endure the severe privations and hardships attendant upon incarceration in the New York City detention facility; was forced to postpone his marriage; suffered extreme shame and embarrassment in relation to his family, finances, friends and employer; lost his employment, and was forced to spend large sums of money in attorneys fees, all the foregoing resulting in damage to plaintiff in the amoutn of ONE MILLION DOLLARS ($1,000,000.00).

WHEREFORE, Plaintiff demands judgment against defendant;for:

a) ONE MILLION DOLLARS ($1,000,000.00) in compensatory damages and

b) ONE MILLION DOLLARS ($1,000,000.00) in punitive damages.

YOURS, etc.....

BELOVIN & FLEISHMAN, ESQS.
Attorneys for Plaintiff
Office & Post Office Address
97-18 Roosevelt Avenue
Corona, New York 11368

DATED: November 5, 1974
Queens, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------x

ELIAN BOLAÑOS

Plaintiff,

-against-

WILLIE RICHARDSON

Defendant.

----------x

Index No.

COMPLAINT

The above named plaintiff, by his attorneys BELOVIN & FLEISHMAN, brings this action against defendant and for his complaint alleges upon information and belief as follows:

1. That at all times hereinaften mentioned plaintiff was a resident of the County of Queens, State of New York.

2. That plaintiff is a Spanish-speaking alien who speaks no English.

3. That on March 6, 1974 plaintiff was at work at Berger Industries at 74th Street and Grand Avenue, Queens, New York.

4. That plaintiff was at work from approximately 7:40 A.M. to 5:00 P.M. on March 6, 1974 and left work at approximately 5:00 P.M. and then took a bus to his home, not getting off the bus until after 5:20 P.M.

5. That after getting off the bus and while walking to his home at 108-27 Roosevelt Ave., Corona, New York, plaintiff was arrested by one D. Mullaly, Shield No. 18732 of the New York City Police Department, 114th Precinct, at the specific instance and and request of defendant and said police officer was acting as an instrumentality of defendant in effecting such arrest.

6. That as a result of said arrest, plaintiff was changed with the crimes of Robbery in the First Degree (3 counts), Assault in the Second Degree, and Possession of Weapons as a felony and was detained in liew of $15,000.00 bail from March 6, 1974 until April 16, 1974.

7. That on April 16, 1974 all charges against plaintiff were dismissed following Grand Jury testimony in Queens County that plaintiff could not possibly have committed the crimes above alleged as he was at work or on his way home from work at the time of the alleged crimes which defendatn, a victim thereof, testified occurred at approximately 5:00 P.M.

8. That defendant knew fully well that plaintiff did not commit such crimes as the real perpetrator spoke English and was hot of Latin origin.

9. That defendant's accusing of plaintiff of having committed the above-noted crimes was vicious, malicious, reckless and had no rational basis in fact.

10. That as a result of the above-noted false arrest and subsequent imprisonment, plaintiff suffered loss of reputation; lost his employment; was forced to endure the deprivation and hand ships of confinement for over a month in the Queens House of Detention; was brought to the attention of the Immigration and Naturalization Service and is as a result is under deportation proceedings; and had to delay his impending marriage, all to his damage in the sum of $100,000.00.

WHEREFORE plaintiff demands judgment against defendant in the sum of $100,000.00 in compensating damages and the

sum of $100,000.00 in punitive damages plus costs and disbursements and for whatever further relief as to the court seems proper.

Yours, etc . . . . . .

BELOVIN & FLEISHMAN
Attorneys for Plaintiff
97-18 Roosevelt Avenue
Corona, New York 11368.-